No. 2696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. F. WETZEL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR

CATLIN, CATLIN & FRIEDMAN,
Attorneys for Plaintiff in Error.

AUGUSTIN C. KEANE,
Of Counsel.

Filed this.....day of August, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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To the Hon. William B. Gilbert, Presiding Judge, and the associate Judges of the United States Circuit Court of Appeals, for the ninth circuit:

Plaintiff in Error respectfully petitions that the decision of this Court herein be set aside and that a rehearing of the cause be granted.

The grounds of the application are:

First: That the form and contents of the indictment in this case together with Plaintiff in Error's right to a fair, certain, intelligible indictment, charging him but once with one offense, as guaranteed under the Fifth Amendment to the Constitution of the United States, has not received adequate consideration at the hands of the Court.

Second: That the Court has failed to give adequate consideration to the Plaintiff in Error's constitutional right to be put in jeopardy and tried no more than once for one offense.

This is an action in which the United States have sought, by an indictment, to charge the Plaintiff in Error with committing three offenses, in violation of Section 211 of the Federal Criminal Code.

On the hearing before this Court the main question raised and the one relied upon here, was that the indictment charged the Plaintiff in Error three times with the same identical offense and *a fortiori* placed the plaintiff in error thrice in jeopardy for the same offense. In the court below the Plaintiff in Error availed himself of every means within his command to correct this error and to protect his constitutional right. He waived nothing.

Plaintiff in Error feels assured that the Court has erred in rendering its decision affirming the rulings and judgment of the District Court and feels confident that the indictment is a violation of his constitutional right to be put in jeopardy and tried but once for one offense; that said indictment charges him with the commission of but one offense three separate and distinct times; that the depositing in the mail of a letter containing any or all of the matters enumerated in Section 211 of the Federal Criminal Code comprises but one offense against the laws of the United States.

The purpose of Section 211 was to constitute the depositing in the mails of certain prohibited matter an offense. The contents of any letter deposited in violation of this section is but a secondary element of the crime. To write a letter containing any one of the matters prohibited by Section 211 is a violation of no law that we know of. One may write all such matters as they please with impunity and are not subject to either prosecution or punishment for the same, but when a person deposits a letter containing such matter in the Post Office Establishment of the United States, then he violates the law and not until then. The *depositing of the letter* and *not* its contents constitutes the offense. The contents are resorted to only for the purpose of determining the legality of the deposit. One letter can be deposited in the mail but once at any one moment of time and if it contains either one or all of the prohibited matters contained in Section 211 only one offense has been committed, to wit: the depositing of such a letter in the United States Post Office.

The Supreme Court of the United States has unequivocally stated this to be the law. We quote from *in re Henry,* 123 U. S. 372-374, which was an action maintained for a violation of Section 5480 of the Revised Statutes:

> "The act forbids, not the general use of the Post Office for the purposes of carrying out a fraudulent scheme or device, but the putting in the Post Office of a letter or packet, or the

> taking out of a letter or packet from the Post Office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act. It is not, as in the case of *in re Snow*, 120 U. S. 274, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated."

We also refer this Court to the following cases in which the language quoted above is cited with marked approval.

> *In re De Bara,* 179 U. S. 316-321;
>
> *Francis* vs. *United States,* 152 Fed. 155-156 (C. C. A.).

This Court has erroneously, we firmly believe, held that Plaintiff in Error suffered no prejudice by the ruling of the trial Court in that the judgment imposed virtually had the effect of merely sentencing the defendant below for the commission of but one offense. We gravely doubt if aider by judgment can go to such lengths. If the trial Court was correct in imposing a judgment and sentence for the commission of but one offense (we quote from this Court's opinion)

> "* * * the single act of sending by mail the figures '938' and '100' in answer to a letter of inquiry as to a proposed abortion."

then it erred in not sustaining Plaintiff in Error's motion to quash the indictment and in refusing to compel the Government to elect, and this Court

erred in affirming the action of the trial Court. If, as we contend and as this Court and the trial Court apparently believe, the defendant below committed the "single act" of sending by mail prohibited matter, then he can not be forced to trial upon an indictment charging him with this one offense three separate and distinct times. In this case he would be (and was) tried, not for depositing a letter in the mails containing prohibited matter, but for the various prohibited matters contained in the letter so deposited.

The Fifth Amendment firmly binds the United States and an accused is at all times entitled to the benefits of its provisions; more especially if he insists upon it, as the defendant below did in this case, by a motion to quash the indictment and by motions to compel the Government to elect. Any violation of its provisions is prejudicial to an accused and constitutes such error as will afford him relief from any verdict, judgment or sentence imposed contrary to its terms, and this irrespective of the degree in which the accused was prejudiced. This Court can look only to the fact of whether the accused was granted all the rights guaranteed to him by the Constitution and cannot look to what less or greater extent he was prejudiced by a deviation or violation of its express terms.

The mere deprivation of any one of the rights so guaranteed is a sufficient prejudice *of itself* to afford him relief from any verdict or judgment in which

such deprivation of right forms even the most minute ingredient upon which such verdict or judgment rests.

Before one accused of crime can be tried and, if found guilty, sentenced, he must be charged with the commission of the crime by a good and fair indictment in conformity with the express mandate of the Constitution. The indictment is the keystone which supports each and every other proceeding in the trial of the case, and if this this keystone is defective it must fall and all that it supports must necessarily fall with it.

Counsel for Plaintiff in Error feel assured that if they are accorded the opportunity of once again presenting their contention for the consideration of the Court that they can convince it of the merit of the propositions herein enumerated.

Owing to the fatal illness and decease of one of the senior counsel, Mr. Harry C. Catlin, for Plaintiff in Error the surviving counsel have been unable at this time to make this petition for a rehearing as full and replete with authority as they, under more favorable conditions, would have been able to do and therefore your Plaintiff in Error prays that he be accorded fifteen days additional time from the filing hereof within which to amplify this petition by a supplemental brief containing additional authorities upon the propositions herein briefly enunciated.

Dated, San Francisco, August 2, 1916.

Respectfully submitted,

CATLIN, CATLIN & FRIEDMAN,
Attorneys for Plaintiff in Error.

AUGUSTIN C. KEANE,
Of Counsel.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for Plaintiff in Error and petitioner in the above-entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

LEO R. FRIEDMAN,
Of Counsel for Plaintiff in Error.